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THE attention of third-year students is called to an announcement by the Law School Association that the last day for receiving essays for their annual prize is postponed until April the fifteenth. The increase during the past year in the membership of the Law School Association, which appears by the treasurer's report for 1889, is remarkably gratifying. A gain of one hundred and fifteen members now brings the total up to nine hundred and sixty-three. The Association is in every respect such a credit and substantial help to the Law School that any appearance of life or activity on its part is comforting. Every one who heard or read the proceedings of the Association meeting in 1886 will join in the hope expressed by the treasurer, that this year again the Association will have a meeting, dinner, and an oration.

THE distrust of their legislative bodies shown by Americans has been commented on at length by Mr. Bryce in his "American Commonwealth." It is brought out clearly in the case of *Adair* v. *Ellis*.[1] The case was decided on the ground that the legislature had no power to pass a law permitting the counties to levy a tax to pay insolvent costs due to a solicitor-general, as they are not court expenses. Simmons, J., says: "Let us adhere to a strict construction of the Constitution, at least so far as taxing the people is concerned. No man knows how soon the legislature, city governments, and county governments may be in the hands of non-taxpayers. These restrictions, which are now so much complained of, will then be . . . a barrier against those who desire to put their hands in the public treasury."

This puts rather bluntly the cause of the manifold petty restrictions which are found in recent American constitutions. They are drawn with the idea that the chosen representatives of the people will rob the State to the extent of their ability, and therefore any restriction of their power is so much money saved. This would seem to lead to the conclusion that we should have no legislatures at all; but large powers must of necessity be given to the legislative body, and, if that is corrupt, no constitution in the world can prevent the most serious conse-

[1] 10 S. E. Rep. 117 (Ga.).

quences. So our State constitutions, like the national, should assume that the representatives will act conscientiously, and leave it to the voters to see that they do.

MR. JAMES C. CARTER'S address on "The Provinces of the Written and the Unwritten Law," delivered last July before the Virginia State Bar Association and since published in pamphlet form, is a very striking and valuable contribution to the discussion of codification, on which so much has been already written. The address is largely devoted to showing the impossibility on theoretical grounds of codifying the private law as distinguished from the public law, which Mr. Carter thinks should be in great measure written. The law, he says, "springs from and rests upon the social standard or ideal of justice," and this social standard of justice is in the case of the unwritten law ascertained and declared by the judges, the "experts selected by the people for the purpose," whose duty it is to examine the new combinations of facts as they arise, and to "discover" the principles of justice which apply to the case. To seek to lay down in advance fixed rules to cover all of these infinitely varied combinations he regards as futile; to do less is the work of the digester rather than the codifier proper. The essay also deals with the subject historically, and in its practical bearings.

Justice cannot be done to Mr. Carter's argument by any such faint sketch as this. While it may be open to some criticism, — for instance, as has been pointed out by the "Nation" of Nov. 28, in that it apparently has something to say of an "abstract and absolute justice" existing independently of human society, — it is certainly a very strong and remarkable document. Mr. David Dudley Field's reply in the "Albany Law Journal" of Dec. 14 is sufficiently vivacious and vigorous, but can hardly be treated as ingenuous criticism; it does not appear to deal with the body of Mr. Carter's argument.

Mr. Field, as is well known, has for many years been a member of the various code commissions in New York, and took an active part in drawing up the proposed civil code (commonly known as the Field code) which, with the code of evidence, is still before the New York Legislature. Mr. Carter, representing the New York Bar Association, has been of the foremost opponents of these codes.

A GOOD many people seem to think that the judges in *MacNaghten's Case* have not had the last word on the question of insanity as a defence to the charge of homicide. The progress of the science of medicine during the last half-century, it is urged, has suggested so many new considerations that the law is likely to undergo restatement within the next few years. Recently Sir James Crichton-Brown, in an article on "Responsibility in Mental Diseases,"[1] has put forward the demands of the medical profession, at the same time proposing a novel means for bringing about a reconciliation between old and new notions as to the legal effect of insanity. First, he emphasizes the value of expert testimony; and, secondly, he advocates the formation of a commission of competent and unbiassed authorities — half doctors and half lawyers — to conduct a series of skilled and sustained observations on homi-

1 Popular Science Monthly, Nov., 1889, p. 81.

cides who have escaped punishment on the plea of insanity, and the publication of the results of their investigations. Thus, it is hoped, doctors and lawyers may come to an agreement on the question of insanity and crime. The objective point of agreement in Dr. Crichton-Brown's estimation is a new legal test of insanity in some such form as this : Could he or she help it ; *i. e.*, is there an impairment of will, or even of self-control, caused by defective mental power or by disease affecting the mind? The present test of legal insanity is too narrow, because it does not recognize a class of lunatics who may understand the nature and effect of their deeds, and who are, nevertheless, irresponsible. These are the persons subject to emotional insanity or irresistible impulse.

We doubt if Dr. Crichton-Brown has suggested a test for legal insanity that is destined to prove any more satisfactory than the test laid down in *MacNaghten's Case*. The proposed test, in the first place, brings into court questions of very great nicety, — questions, in fact, so refined that a jury could hardly deal with them. Secondly, the new test does not discriminate carefully enough between those weak minds which the law punishes rightfully, and others which should be allowed the refuge of the word " insanity." The policy of the law is not to let off a person because he cannot resist temptation ; but, on the contrary, to punish just those whose will do not seem able to resist the motives for crime.

If the courts of common law ever take into consideration the whole field of scientific criminology, of which insanity is but one part, and review all the facts bearing on the nature of the criminal under examination, looking at his history, physical and psychical characteristics, mental and moral development, then the finest discrimination can be made, as to the punishment of those who have shown criminal weakness. But when that time comes we fancy that the new test will be found of little practical value. Until that time the simple test of *MacNaghten's Case* seems likely to be satisfactory, because it relieves from the operation of the law a class of unfortunates who would fare equally well under any just system of criminal law, and it does not liberate persons of questionable irresponsibility.

THE doctrines of the Positive School of Criminology do not seem to be gaining ground among lawyers very rapidly. The necessity of absolute elimination of a certain criminal element from society as a condition of social progress, which has been maintained so strenuously by Garofalo, is emphatically denied by the new Zanardelli code, which abolishes the death penalty in Italy. This is on the very stamping-ground of the Positivists, and in spite of their efforts. Lombroso, Garofalo, and Ferri, the champions of this new school, are all Italian scholars, though they draw their inspiration from Darwin and Spencer. Moreover, Italy is but following the example of the other European nations, hardly one of whom, with the exception of England, now inflicts the death penalty.

More recently still the Judicial Congress of Lisbon has promulgated opinions which do not profess to follow, and do not in fact follow, positive notions as to the treatment of criminals. The Congress was composed of jurists and lawyers from Spanish and Portuguese speaking countries

who assembled for general discussion of legal questions. The section on Criminal Law took up the following question: In what way is it urgent to reform the criminal codes in respect to criminal responsibility in order to bring the theory of the law into accord with the doctrines of modern psychology, criminal anthropology, etc., and at the same time to satisfy the necessity of giving society all possible security against criminals? Their conclusions were embodied in three resolutions, which were approved by a majority of the General Assembly: —

1. Penal laws ought to provide not only for the insane, but for those delinquents who, without being absolutely mad, nevertheless are not entirely responsible for their actions.

2. The delinquent who has been shown by medical examination and all other legal means to be absolutely mad, should be confined for life in a hospital or asylum.

3. Those who, though not absolutely mad, are yet partly irresponsible and dangerous, should be tried and temporarily confined in places designed for them.[1]

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

AGENCY — EXCLUSIVE AGENCY TO SELL. — An exclusive agency to sell merely prohibits the appointment of another agency for the sale of the property, but does not prevent the owner himself from making a sale. *Dole* v. *Sherwood et al.*, 43 N. W. Rep. 569 (Minn.).

CONFLICT OF LAWS — ASSIGNMENT FOR BENEFIT OF CREDITORS. — In an assignment for the benefit of creditors, made in Dakota, where preference is allowed, by a resident of Minnesota, a policy of insurance on property in Dakota, which had been destroyed by fire, passed to a creditor in Minnesota, where preference is not allowed. *Held*, the assignment, being of a claim owned by a citizen of Minnesota, though good in Dakota, where it was made, is not good in Minnesota, being contrary to her laws. There are exceptions to the rule that an assignment, if valid where made, is valid anywhere. *In re Dalplay*, 43 N. W. Rep. 564 (Minn.).

CONSPIRACY — COMBINATION TO KEEP UP RATES OF FREIGHT — RIGHTS OF COMPETITORS. — The defendants were firms of ship-owners trading between China and Europe. With a view to obtaining for themselves a monopoly of the homeward tea trade, and thereby keeping up the rate of freight, they formed themselves into an association, and offered to such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of this association a rebate of 5 per cent. on all freights paid by them. They also reduced rates much below a remunerative standard in order to drive outside ship-owners from the field. The plaintiffs, who were rival ship-owners, trading between China and Europe, were excluded by the defendants from all benefits of the association, and in consequence of such exclusion sustained damage. *Held* (by Bowen and Fry, L. JJ., Lord Esher, M. R., dissenting), affirming the judgment of Lord Coleridge, C. J., that the association being formed by the defendants with the view of keeping the trade in their own hands, and not through any personal motive or ill-will towards the plaintiffs, was not unlawful, and that no action for conspiracy was maintainable. *Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, 23 Q. B. D. 598 (Eng.).

This case is interesting for the light which all the opinions throw upon the important question of the rights of trade combinations. Lord Esher, in his dis-

1 Bulletin de Législation Comparée, 20ième année, no. 7, p. 732.